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PROCUREMENT

Competitive negotiation

Note by the Secretariat

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INTRODUCTION

1. As reported in A/CN.9/WG.V/WP.22, paras. 59 to 61, and 201 to 213, the procurement laws of many countries provide for procurement by negotiation between the procuring entity and contractors and suppliers prior to the award of the procurement contract. In view of the presence of such provisions in the procurement laws of many countries, the first draft of article 7 of the Model Law on Procurement (A/CN.9/WG.V/WP.24) provided for a method of procurement referred to as "competitive negotiation", which could be used when tendering proceedings had been engaged in but were unsuccessful or when the estimated value of the procurement contract was below a level set in the procurement regulations. Draft article 34 established certain procedural requirements designed to incorporate objectivity, fairness and competition into the competitive negotiation proceedings. At the eleventh session, in reviewing the first draft of article 7, the Working Group affirmed that it was desirable for the Model Law to provide for competitive negotiation as a method of procurement available to the procuring entity in certain circumstances in which tendering was not a suitable method of procurement (A/CN.9/331, para. 41). At that session, there was also significant support for expanding the circumstances in which competitive negotiation proceedings could be used beyond those provided for in the first draft of article 7 (A/CN.9/331, para. 42). In reviewing the second draft of article 7 at the twelfth session, the Working Group reaffirmed its decision to retain competitive negotiation in the Model Law in certain specified circumstances (A/CN.9/343, para. 70) and agreed upon conditions to be set forth in the Model Law for the use of that method of procurement (A/CN.9/343, para. 85). 1/

2. During the adoption of the report of the twelfth session, the secretariat was requested to prepare a report to the next session on provisions in national procurement laws relating to the conditions and procedures for use of the competitive negotiation method of procurement. 2/ The present document contains that report.

I. GENERAL REMARKS

3. The method of procurement most commonly mandated in procurement legislation is publicly advertised competitive tendering, open to all eligible and qualified contractors and suppliers. An important reason for the predominant use of competitive tendering is that it generally is most likely to lead to economy and efficiency in the use of public funds, in addition to

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1/ In accordance with the Working Group's decision that article 7 should list all the methods of procurement available under the Model Law, and that the conditions and procedures for use of those methods should be set forth in the individual articles dealing with those uses, it is suggested in A/CN.9/WG.V/WP.30 that the conditions for use of competitive negotiations agreed upon by the Working Group should be located in article 34.

2/ Because the request for the present report was made during the adoption of the report of the twelfth session rather than during the deliberations of the Working Group or during its discussion of future work, no mention is found of that request in the report of the twelfth session.

serving as a safeguard against waste, corruption and favoritism. Notwithstanding the preference for competitive tendering, the procurement laws of most countries recognize that in certain situations competitive tendering may not be an appropriate method of procurement. Therefore, the procuring entity is often permitted to use certain other methods of procurement, including engaging in negotiations with one or more contractors or suppliers with a view to entering into a procurement contract.

4. The present report focuses on the provisions in national laws that establish conditions for use and procedures for use of the type of procurement method referred to in the draft Model Law as "competitive negotiation". In considering the conditions and procedures for use of such a method, it is necessary to bear in mind that competitive negotiation is a distinct method of procurement, apart from other methods of procurement which involve a degree of pre-award negotiation between the procuring entity and contractors and suppliers. In competitive negotiation proceedings as provided for in the draft Model Law and in the procurement laws of a number of countries, the procuring entity is given a relatively free hand to conduct the procurement proceedings as it sees fit, in particular with respect to the selection of negotiating partners, the conduct of the negotiations and the examination and comparison of proposals. By contrast, methods such as two-stage tendering and request for proposals proceedings, though they involve some degree of negotiation, are subject to a relatively elaborate procedural framework. This report covers only negotiation as a separate method of procurement, not negotiation as an element in some other method of procurement.

5. The laws of a number of countries do not provide, as does the draft Model Law, for two distinct methods of procurement to cover, on the one hand, cases in which negotiation with only one contractor or supplier is possible (covered under the draft Model Law by single source procurement) and, on the other hand, cases in which negotiations can be conducted with more than one contractor or supplier (covered under the draft Model Law by competitive negotiation). Instead, such laws list the various conditions in which the procuring entity is permitted to procure by negotiation, including single source situations. Some of those laws include a general requirement that in negotiation proceedings the procuring entity, to the degree possible, should negotiate with a sufficient number of contractors and suppliers judged susceptible of filling the procurement need so as to ensure competition. To the extent that conditions for the use of negotiation in those types of statutes relate only to single source procurement, they are not discussed in the present report.

II. CONDITIONS FOR USE OF NEGOTIATION

6. In the procurement laws of some countries, designated governmental authorities or procuring entities themselves are given broad discretion to authorize or to engage in procurement through negotiation when it is considered appropriate to do so. In some of those countries, procuring entities operating in particular economic sectors (e.g., transportation or energy) are given more discretion than procuring entities operating in other sectors in deciding whether to procure through negotiation. A reason for such an approach may be that procuring entities operating in certain sectors often procure goods or construction of a high degree of technological sophistication

or complexity and negotiation is regarded as essential for meeting the needs of the procuring entity (see paragraph 7, below). However, instead of granting such discretion, or in addition to doing so, the procurement laws of most countries specifically define the types of conditions in which a procuring entity may engage in procurement through negotiation. The principal types of conditions for the use of negotiation that are found in national procurement laws and that appear to be relevant to further consideration by the Working Group are discussed below. Those conditions are generally of the type agreed upon by the Working Group for the use of competitive negotiation under the Model Law (see A/CN.9/343, para. 85).

A. Nature of goods being procured

7. The procurement laws of many countries set forth conditions for the use of negotiation that relate to the nature of the goods or construction being procured. The laws of a number of countries authorize procurement through negotiation when the goods or construction are of a high degree of technological sophistication or are particularly complex or unique. For example, some statutes refer to the procurement of non-standardized, technologically advanced goods, such as ships, aircraft or computers, that must be specially tailored to meet the needs of the procuring entity as a case in which the negotiation may be used. Provisions are also found in some countries authorizing negotiation when there is a need for the contractor or supplier to make use of a patent or special process in which it has a proprietary interest in order to meet the needs of the procuring entity or when only a few contractors or suppliers have the technical or commercial capability of meeting the procuring entity's needs. Yet other provisions are found permitting negotiation when the nature of the goods or construction make it impossible for a contractor or supplier to make a prior estimate of the overall price of the procurement contract. The laws of a number of countries explicitly permit the procurement through negotiation of works of an artistic nature.

8. The laws of some countries authorize procurement through negotiation when the goods or construction, due to their particular nature or intended use, have to be purchased or executed in a certain place.

B. Purpose of procurement

9. Procurement laws generally contain provisions authorizing procurement through negotiation on the basis of the purpose for which goods or construction are being procured. Foremost in this category are provisions authorizing negotiation for procurement involving national defence or national security considerations. A factor cited in many such provisions is the need to maintain secrecy. Other defence-related factors cited in some laws as possible justifications for procurement through negotiation include the need to develop production capacity in certain industries and the need to maintain the rapid production capacity of certain industries.

10. Procurement laws also generally authorize the procurement through negotiation of goods or construction to be used for the purpose of research or testing. The procurement laws of some countries permit negotiation when goods or construction are being procured for other specified purposes (e.g, in

connection with the official residences of certain government officials or for the use of certain government instrumentalities).

C. Urgency

11. The laws of most countries permit procurement through negotiation in cases in which there is an urgent need for the goods or construction. In some of those countries, however, resort to negotiation on the grounds of urgency is limited to cases in which the urgency arises from circumstances, such as natural disasters, that are unforeseeable or not attributable to the procuring entity. A particular case of urgency to which reference is made in the laws of some countries is the default in the performance of a procurement contract by a contractor or supplier or a rescission of a procurement contract by the procuring entity. In some countries, resort to negotiation in such cases is authorized only if it is not possible to select a new contractor or supplier on the basis of tenders submitted in the tendering proceedings that gave rise to the original procurement contract.

D. Amount of procurement contract

12. While the laws of many countries authorize negotiation in the context of high value procurement, at the same time provisions are commonly found permitting the procuring entity to engage in procurement through negotiation for contracts whose estimated value falls below a specified level. In some countries, the level below which negotiation is permitted varies according to the type of goods or construction being procured.

E. Unsuccessful tendering proceedings

13. The procurement laws of a number of countries permit procurement through negotiation when the procuring entity has engaged in tendering proceedings but either no tenders or no responsive tenders have been submitted. Some statutes that give the procuring entity the right to procure through negotiation following unsuccessful tendering proceedings impose limitations on that right. In particular, provisions are found requiring the procuring entity to attempt the tendering proceedings a second time before resorting to negotiation. In some countries, the second tendering proceedings may be avoided in cases of urgency. Another limitation stipulated in the laws of some countries is that negotiation may be used following unsuccessful tendering proceedings only if the original terms of the procurement contract to be concluded are not substantially altered.

III. PROCEDURES FOR USE OF NEGOTIATION

14. Procedures to be followed in procurement through negotiation are typically characterized by a higher degree of flexibility than the procedures applied to other methods of procurement. Few rules and procedures are established to govern the process by which the parties negotiate and conclude their contract. In some countries procurement laws allow procuring entities virtually unrestricted freedom to conduct negotiations as they see fit. The

procurement laws of other countries establish a procedural framework for negotiation designed to maintain fairness and objectivity and to bolster competition by encouraging participation of contractors and suppliers. Provisions on procedures for procurement through negotiation address a variety of issues discussed below, in particular, requirements for approval of the procuring entity's decision to procure through negotiation, selection of negotiating partners, criteria for comparison and evaluation of offers, and the record of the procurement proceedings.

A. Approval

15. A threshold requirement found in many countries is that a procuring entity obtain the approval of a higher authority prior to engaging in procurement through negotiation. Such provisions generally require the application for approval to be in writing and to set forth the grounds necessitating the use of negotiation. Approval requirements are intended, in particular, to ensure that the negotiation method of procurement is used only in appropriate circumstances. The laws of some countries require approval only for contracts whose value exceeds a specified level. In some provisions of that type, different levels are set for different types of procurement (e.g., the level above which approval would be required may be higher for the procurement through negotiation of construction than for the procurement through negotiation of supplies).

16. Some procurement laws that stipulate unsuccessful tendering proceedings as a grounds for resorting to negotiation (see paragraph 13, above) exempt the procuring entity from the approval requirement if all contractors and suppliers that participated in the procurement proceedings and that met eligibility requirements are given an opportunity to participate in the negotiations.

B. Selection of negotiating partners

17. In order to make the negotiation proceedings as competitive as possible, the procurement laws of a number of countries contain a general requirement that the procuring entity must engage in negotiations with as many contractors or suppliers judged susceptible of meeting the procurement need as circumstances permit. Beyond such a general provision, there is no specific provision in the laws of some countries on the minimum number of contractors or suppliers with whom the procuring entity is to negotiate. The laws of some other countries, however, require the procuring entity, where practicable, to negotiate with, or to solicit proposals from a minimum number of contractors or suppliers (e.g., three). The procuring entity is permitted to negotiate with a smaller number in certain circumstances, in particular, when less than the minimum number of contractors or suppliers were available. The laws of some countries further specify that negotiation of contracts whose value falls within a specified range must involve a minimum number of contractors or suppliers from certain categories or lists (e.g, economically disadvantaged contractors and suppliers).

18. Under the laws of many countries the procuring entity is allowed to contact directly the contractors and suppliers with whom it wishes to negotiate without the need to advertise the procurement proceedings or adhere

to any other formal notice requirements. However, the laws of a number of countries require a notice of the negotiation proceedings to be given to contractors and suppliers in a specified manner. For example, the procuring entity may be required to publish the notice in a particular publication. Such notice requirements are intended to bring the procurement proceedings to the attention of a wider range of contractors and suppliers than might otherwise be the case, thereby promoting competition. Some laws also provide that, as in formal tendering, the notice should contain specified types of information and should be issued in sufficient time to allow contractors and suppliers to prepare offers. In the procurement laws of some countries, formal notice requirements are applicable to procurement through negotiation only if the estimated value of the procurement contract is above a specified level.

19. In some countries, notice requirements are waived when the procuring entity resorts to negotiation following unsuccessful tendering proceedings (see paragraph 13, above) if all qualified contractors or suppliers that submitted tenders are permitted to participate in the negotiations or if no tenders at all were received.

20. Eligibility requirements for participation of contractors and suppliers in negotiation proceedings are another aspect of the selection of negotiating partners addressed in some procurement laws. Generally the formal eligibility requirements applicable to contractors and suppliers in tendering proceedings also apply in negotiation proceedings.

C. Criteria for comparison and evaluation of offers

21. The procurement laws of some countries refer to general criteria for comparing and evaluating offers made during the negotiations and for selecting the winning contractor or supplier. For example, the procuring entity may be required to negotiate the "most economical" or "most advantageous" procurement contract, taking into account factors such as the technical merit of an offer, price, operating and maintenance costs, the effect of the contract terms on the contractor or supplier, and the profitability and development potential of the procurement contract.

D. Record of procurement proceedings

22. The laws of a number of countries require a procuring entity that engages in procurement through negotiation to establish a record of the procurement proceedings. Provisions of this type require the record to include information concerning the circumstances necessitating the use of negotiation, the contractors or suppliers invited to negotiate, the contractors or suppliers that requested to participate, and the contractors or suppliers that were excluded from participating and the grounds for their exclusion.